United States Court of Appeals

for the Second Circuit

REPLY BRIEF

Signed original with certificate of service

76-4147

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-4147

AAACON AUTO TRANSPORT, INC.

Petitioner,

V.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE INTERSTATE COMMERCE COMMISSION

PETITIONER'S REPLY BRIEF

William Q. Keenan
Attorney for Petitioner
277 Park Avenue
New York, New York 10017

OF COUNSEL:

Arsham & Keenan
277 Park Avenue
New York, New York 10017
(212) PLaza 9-1000

B P/S

TABLE OF CONTENTS

TABLE OF CASES

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

AAACon AUTO TRANSPORT, INC., Petitioner, v. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 76-4147 PETITIONER'S REPLY BRIEF

ARGUMENT

I. The Commission failed to deal with the issues.

The joint brief of the Commission and the United States,[1/] at p. 12 finds it difficult to discern AAACon's assignments of error in this proceeding. Most of them fall under the third issue presented, and stated at pp. 1 and 2 of the AAACon opening brief, and they stem from the requirement of the Administrative Procedure Act, 5 U.S.C. §557 (c)(A) that an agency order which must be based on a hearing and a record of that hearing must include a statement of findings and conclusions and the reasons or basis therefor on all the material issues of fact, law and discretion presented on the record. Again and again and again, as AAACon's opening brief[2/] itemizes and as the balance of this brief will itemize, AAACon has raised such material issues and the Commission has ignored them. Not only has the Commission

---

1/ Hereinafter cited as "ICC Br."

2/ Hereinafter cited as "AAACon Br."

ignored them when it acted as a tribunal, but now the Commission's counsel, defending the Commission on appeal, ignores these issues. AAACon has asked to have them resolved and has tendered evidence in support of that resolution. The order under review reflects no slightest awareness of most of this evidence and therefore cannot possibly have been issued upon consideration of the whole record or those parts thereof cited by AAACon, as required by Section 556(d) of the Administrative Procedure Act, 5 U.S.C. §556(d).

This appeal pends not from any complaint that the Commission resolved these issues against AAACon's interest. Our complaint is that the Commission never resolved them at all. The Commission's counsel does not resist or refute AAACon's argument that these issues were material, were presented, and were not dealt with; counsel never deals with AAACon's argument.

Maybe AAACon is wrong. Maybe none of its issues and none of its evidence have substance. We cannot reach that point of decision in this proceeding, however, because the trouble is AAACon's issues have never had their day in court; they have never been decided. This is the essential, abiding basis for this appeal.

II. AAACon did not violate the restriction against transportation of automobiles to dealers.

The Commission concedes (ICC Br. 25) that: " . . . movements of leased, repossessed, stolen or abandoned used automobiles to automobile dealers did not constitute transportation to auto dealers in the usual sense - i.e., new autos . . " (Emphasis added). This is the third time that a responsible Commission employee after careful consideration has interpreted the restriction in AAACon's certificate "against the trans-

portation of any traffic . . . moving to automobile dealers" in a manner other than that adopted by the Commission. The first was when an ICC hearing examiner granting the certificate accepted as relevant testimony of a need for transportation to an auctioneer who sold autos to dealers and the public (AAACon Br. 37). When he later changed his mind, saying this type of shipment would constitute prohibited transportation to dealers, the Commission reversed him, demonstrating the lack of clarity inherent in this restriction. The second was the ICC Section of Motor Carriers, which informally advised AAACon that the transportation to financial institutions or to the offices of AAACon agents was permitted by AAACon's certificate, even if the cars would later be moved by others (unconnected with AAACon) to dealers. (AAACon Br. 46-47.)

At p. 28 the Commission brief implies AAACon bad faith in relying on this interpretation of AAACon's certificate by the Section of Motor Carriers. "If AAACon really desired an answer" after it received this advice "it should then have filed a petition for a declaratory order," says counsel for the Commission. If this is true, why does the Commission's staff issue advice responding to carrier inquiries? Of course, the Commission is not bound by such advice, but the implication cannot withstand analysis that such advice is worthless and that a carrier is not entitled to rely on it until the Commission reverses it. The Commission ignores AAACon's problem and its argument: what was wrong with the advice of the Section of Motor Carriers? It was logically reasoned. Where did its logic fail? The Commission's error is not in refusing to follow the ruling of its staff, but in refusing to explain the <u>why</u> of this reversal. This

constitutes failure to resolve a material issue of fact, law and discretion presented on the record.

Quite obviously AAACon was guilty of no bad faith (or bad judgment) in relying on the staff opinion. Equally obviously, the restriction had no "clear intent" (order under review, R.A., p. 1808) when so expert and sophisticated people as members of the Commission's own staff could not discover that intent. The existence of an interpretation of the restriction at least as reasonable as that of the Commission justifies and compels examination of the record upon which AAACon's certificate was granted, Akers Motor Lines v. United States, 286 F. Supp. 213, 220-221 (W.D., N.C., 1968), and precludes any finding that AAACon was unfit due to a failure to predict the effect which the Commission would assign to the restriction in the order under review.

III. The Commission may not rely on Catch 22 by citing AAACon for bad claims handling, and then disclaim interest in the merits or outcome of the claims cited.

The Commission says AAACon, by attempting to justify its actions in specific claim situations, "totally misses the point of the Commission's decision. The Commission simply was not interested in the relative merits of any given claim." (ICC Br. 27). That "simply" isn't true. The same paragraph of the ICC brief quoted above refers to this type of "specific claim situations" as examples of AAACon's "past misconduct." (ICC Br. 27. Cf. ICC Br. 17-19). The Commission cannot have it both ways. If the merits of particular claims are irrelevant, the ICC cannot assume that those claims were meritorious and AAACon's denial thereby unreasonable. If the merits

of claims are indeed at issue, AAACon is entitled to present evidence and have it considered by the Commission.[1/] The order under review has assumed in effect that AAACon's patrons' claims were all valid, and AAACon's evidence to the contrary was worthless. This was error because no basis exists for such a presumption of guilt. United States v. Provident Trust Co., 291 U.S. 272, 282 (1934). See 9 J. Wigmore, Evidence §2492 (3d ed., 1940).

Despite the Commission's disclaimer that it did not seek to resolve specific claim situations, the order under review summarized four of them (R.A., p. 1805)[2/] immediately following the accusation (Id.):

> " . . . that AAACon is denying liability, with little or no investigation into the merits of the claim, because of an alleged mechanical defect in the transported vehicle, an alleged so-called 'act of God,' or because of the execution of a 'clear receipt.'
>
> "Clearly, for a motor carrier to assert a valid defense in one instance, but not in another, would leave the carrier open to the charge that it is illegally favoring one shipper over another. This assumes, however, that the defenses asserted are valid, have a basis in fact, and are not raised as a means of discouraging a claimant from seeking relief."

Did the defenses listed by the Commission have a basis in fact? Although the ICC order speaks of "an alleged mechanical defect" and "an alleged so-called 'act of God'" AAACon's allegations as to the facts must be accepted since the Commission did not seek to resolve specific claim situations

---

1/ Some of the factors cited by the Commission, like the terms of its bill of lading and insurance policies, do not relate to individual claims. Even as to these, the ICC failed to consider their actual provisions (AAACon Br. 10-11) or the defense of good faith (AAACon Br. 12).

2/ This summary, apparently of the merits, is answered in detail in AAACon Br. 13-35.

or consider AAACon's evidence on those situations. The factual basis for the third defense discussed, "the execution of a clear receipt," must certainly be accepted as based on the facts since the Commission did not even characterize the execution of the receipts as "alleged."

Given the factual basis, are the defenses legally sound? A latent mechanical defect in a car that results in further damage during transportation is an inherent defect or vice in the property for which the carrier is not liable. Eastern Motor Express Co. v. A. Maschmeijer, Jr., Inc., 247 F.2d 826, 828 (2 Cir., 1957). An "act of God" is also an express exception in the uniform bill of lading and at common law to the strict liability of common carriers.[1/] A clear receipt is not a defense to carrier liability but it is evidence of a defense: that the goods were delivered in the same condition as when they were tendered to the carrier. Badhwar v. Colorado Fuel & Iron Corp., 138 F. Supp. 595, 616 (S.D., N.Y., 1955); Tierney v. N.Y. Central R. Co., 10 Hun. 569, 570, 67 Barb. 538, 542-543 (3d Dept., 1877), affd. 76 N.Y. 305 (1879).

Finally, if the three defenses were legally sound and had a factual basis, were they nevertheless raised by AAACon simply to discourage claimants from seeking relief? About the only way this could be done is if AAACon denied the claims before receiving any information indicating a defense. The Commission did accuse AAACon of "little or no investigation of the merits of the claim" (R.A., p. 1805). The example chosen by the

---

1/ The Commission's terminology, "an alleged so-called 'act of God,'" implies doubt about the legal validity of the defense as well as its factual basis. However on the preceding page (R.A., p. 1804) the ICC included "so-called 'acts of God'" among the recognized exceptions to carrier liability.

ICC to substantiate this charge, the claim of General Wolfe, has been refuted (AAACon Br. 32-33). Additionally, some claims are patently unjustified and require "little or no investigation." One example given by a leading text focuses on claims for shortage where the consignee did not note anything missing on the delivery receipt; but the principles also expressly apply to damage apparent at the time of delivery which the shipper fails to note on the delivery receipt:

> "The primary purpose of a delivery receipt, from the viewpoint of both carriers and honest consignee, is to preserve a precise record of facts which existed at time delivery was made so far as these facts can be reasonably ascertained . . . Certainly as a matter of logic, the carrier is entitled to a written record of delivery of the property entrusted to its care. From the consignee's viewpoint, the signing of an exact statement at time of delivery will be very helpful. In the event a claim is found necessary, a positive statement by not only a responsible employee of receiver but also by the delivering carrier's driver will help to properly support a claim for shortage. A consignee's memorandum or carrier's delivery receipt which states exact facts as to number of piece delivered or apparent condition of property when delivered, will serve to assist the claimant and carrier in determining the validity of claim . . .
>
> "When a claim is filed against a carrier for shortage of an entire package or other item listed on delivery receipt and the delivery receipt carries no notation of shortage other than a vague notation such as shipment 'received subject to recount,' the carrier should promptly decline the claim. In the final analysis in such cases, it is the carrier's driver's word against the consignee's employee's word and the carrier should certainly stand by its own records and employees." (Emphasis added.) R. Sigmon, ed., Miller's Law of Freight Loss and Damage Claims, (4th ed., 1974) pp. 208-209.

The elements of a shipper's cause of action against a common carrier for loss or damage to property are the tender of the goods to the carrier at origin in good condition, delivery by the carrier at destination in damaged condition or not at all, and the amount of damages. Missouri

Pacific R.R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964). If the consignee signs a "clear receipt" that is evidence that the goods were undamaged at the time of delivery, at least as far as could be ascertained by reasonable observation. If the damage was not apparent at the time of delivery, the claimant must show whether the damage occurred before or after delivery; and if before, whether the damage was present at the time of tender to the carrier. A clear delivery receipt is both evidence of no visible damage at delivery and a good reason for the carrier to refuse payment of claims unless the shipper has some countervailing evidence that the damage occurred during, not before or after, transportation.

Perhaps the Commission has the authority and the expertise to impose regulations limiting the use of delivery receipts although §8 of the Bills of Lading Act, 49 U.S.C. §88, implies otherwise. The point is that no such regulations exist, save only as the cease and desist order here imposed on AAACon may impose a different rule than applies to all other regulated carriers. The order under review errs in failing to answer the question why AAACon should be forbidden to rely on clear delivery receipts when all other carriers are allowed to.

IV. The order under review errs by leaving the factual and legal issues concerning AAACon's claims unresolved, and does this by ignoring most of the evidence, thus failing to decide on the "whole record."

A. The issue of claims denial "when the facts available are inconsistent with denial."

When a carrier receives a claim it has only three choices: (1) refuse to acknowledge it and do nothing, (2) deny it, or (3) pay it. Com-

mission regulations legitimately prohibit the first alternative -- nor is there accusation of AAACon failure to comply with this requirement. (AAACon Br., p. 52). The order under review forbids AAACon to deny a claim when "the facts available are inconsistent with denial." (AAACon Br., p. 34). This reduces AAACon's choice only to the third alternative in such a situation and amounts to an order to pay claims. AAACon raised the issue that the Commission has no power to compel payment of claims and, indeed, the Commission has admitted this truth in Loss and Damage Claims 340 ICC 515, 539 (Ex Parte 263, 1972). The order under review ignores this issue and so does the ICC's brief (p. 16).

B. The issue of "overwhelming evidence."

At p. 13 the ICC brief contends that "the evidence" in support of the order under review "was overwhelming," but the Commission's brief supports its accusations against AAACon with references to the Commission's decisions rather than to the evidence in the record. Twenty-nine times it cites the Administrative Law Judge's initial decision (R.A., pp. 1548-1594) or the order under review (R.A., pp. 1793-1811). Only nine citations are made to the evidence. Nothing could more clearly illustrate AAACon's difficulty in articulating this appeal. The language of the order under review is damning, because it never addresses or deals with the issues AAACon raised or the evidence AAACon introduced (which, on the other hand, was also never rejected or overruled). For instance the Commission failed to deal with any of AAACon's points (AAACon Br., p. 9-11) that the initial decision contains clear mistakes on vital facts. The ICC brief doesn't even deny our ultimate conclusion: that the order under review ignored material evidence and issues.

When AAACon's argument goes behind the order to detail the evidence and the issues, the Commission's only reply is to claim that the evidence was "overwhelming" and to cite the terms of the order that found it overwhelming. The ICC brief simply repeats the accusations of the initial decision as though repetition could substitute for testimony.

C. Fraudulent shipper claims.

Some of the 23 claims testified to by shippers were valid. Many more were invalid or highly inflated. A few were fraudulent. The ICC brief cites these against AAACon with complete insouciance, namely those of Mrs. Raze (ICC Br. 19), and the fraudulently inflated claim of Mr. Coggins involving a car consigned from Elberton, Georgia to Denver, Colorado. (ICC Br. 18).

1. The Raze claim.

Mrs. Raze's claim was for damage to a 1966 Mustang auto (R.A., p. 738) and for loss of the contents of the vehicle's trunk, including a chandelier, a framed etching, articles of clothing in a shopping bag, 3 additional dresses and 5 additional pairs of shoes, a water pitcher with a tray, an attache case and a small radio. (R.A., p. 711). Mrs. Raze was certain that these items were in the trunk at the time of tender to AAACon because she opened the trunk of the car and showed them to the driver. (R.A., p. 737). Mrs. Raze also testified there were two tires in the trunk both when tendered and delivered. (R.A., p. 738), along with the additional items packed in the trunk. After supplying the approximate dimensions of the items she said were in the trunk (R.A., p. 717-718),

she conceded that, if two tires were in the trunk, what remained would be only "stuffing space." (R.A., p. 721). Actually the freight bill Mrs. Raze signed at the beginning of transportation lists the luggage in the trunk as "possible small packages before tires." (R.A., p. 1955). AAA-Con's witness testified that the trunk size for a 1966 Mustang was nine and a half cubic feet, of which the two tires would have exhausted all but two and one quarter cubic feet. (R.A. , pp. 1473-1474). In other words the items that Mrs. Raze said were in the trunk at the time of tender to AAACon could not have been there.

AAACon's bill of lading and tariff limited its liability for personal property transported in an auto to $50 unless a higher value was declared at the time of shipment and additional charges paid. This tariff provision was authorized by a released rate order of the I.C.C. (R.A., pp. 726-727). Mrs. Raze never paid AAACon the final $50 of freight charges (R.A., p. 725). Therefore she retained the full amount to which she would have been entitled for the "missing" items had they actually been lost.[1/]

AAACon properly declined the claim for damage to her car on the grounds it was caused by an inherent mechanical defect, a conclusion concurred in by her own insurance company. (R.A., pp. 729-730). Although she was upset that the driver had left her car very dirty inside, her claim was for

---

1/ Offsetting of loss and damage claims against freight charges is lawful under the Interstate Commerce Act. In Re Yale Express System, Inc., 326 F.2d 111, 114 n. 2 (2 Cir., 1966). [per Friendly, C.J.]. However AAACon had halted such offsets prior to the testimony of its witness (R.A., pp. 1405-1406).

damage, not dirt, and AAACon can pay money damages only if the car is damaged. (R.A., p. 1475). AAACon could not lawfully clean the car without collecting its tariff charges, for this service. 49 U.S.C. §317 (b).

2. The Coggins claim.

Mr. Coggins' car was unquestionably damaged and AAACon assumed full liability. (R.A., p. 1379). AAACon put the responsible employee on probation, fined him (R.A., p. 1378) and eventually fired him. (R.A., p. 1686). Mr. Coggins' response was not as exemplary, because he reported the vehicle as stolen (R.A., p. 1382), and made claim for the fair value of the vehicle at $5,200 (R.A., p. 1582). Apparently relying on Mr. Coggins' advice, his insurance company brought suit against AAACon for that amount, claiming that the car was "just driven out of the dealer's showroom." (R.A., p. 1938). The case was settled as soon as the insurance company learned that the vehicle had 9,354 miles on it when tendered to AAACon. (R.A., p. 1940). A false report of a stolen vehicle and a false report of the condition and value of a car in support of a claim are fraudulent.

These were not the only fraudulent claims in the record although they were the only ones cited by the Commission's brief. The Commission completely failed to consider whether the incidence of shipper fraud had a bearing on the reasonableness of AAACon's claims practices. Particularly, the Commission failed to consider whether the instances of shipper fraud justified AAACon in relying upon clear receipts given by the shipper as grounds for denying claims.

D. AAACon's voluntary claims payments.

The Commission ruled (ICC Br. 16; R.A., p. 1558) that AAACon demonstrated its "policy" of arbitrarily denying claims by paying three claims immediately after the claimants (Klausner, Weller and Bracken) testified in this proceeding. Was it wrong for AAACon to pay these claims? Could AAACon gain any benefit by paying the claims after the testimony was in the record? The Commission charged that AAACon's initial denial of the claims was unjustified, because AAACon had all of the relevant evidence for more than a year before the hearing. This is not true and no evidence exists to support such a finding.

Mr. Klausner's claim was paid on the basis of a letter from AAA-Con's Florida agent supporting Mr. Klausner's contentions which was first shown to AAACon at the hearing. (Exhibit 62, R.A., p. 1824); (Tr., MC-C-7287, p. 537; R.A., pp. 1342-1343). Mrs. Weller's claim was paid on the basis of AAACon's evaluation of her demeanor at the hearing. AAACon concluded from her testimony that Mrs. Weller was an honest person who would not file a false claim (R.A., pp. 1399-1400); and paid her although she had signed a clear receipt indicating delivery in good condition. (R.A., p. 1398). AAACon originally denied Mr. Bracken's claim because his payment of a repair bill submitted by the driver was not required by the bill of lading. After his testimony AAACon paid this claim feeling that his payment to the driver was more the result of confusion compounded by Mr. Bracken's age than a voluntary payment to the driver or an attempt to deprive AAACon of its recourse against the driver. (R.A., pp. 1320-1322).

In each instance, the initial decision, the order under review, and the Commission's brief ignore both the new evidence presented by these witnesses and the testimony of Mr. Ralph Zola explaining the basis for AAACon's voluntary payment after hearing the claimants' testimony. The Commission, apparently determined to penalize AAACon, omitted from its analysis Mr. Bracken's testimony that his car was delivered, after the window repair, in first class condition (R.A., p. 545); that AAACom promptly acknowledged his claim (R.A., p. 548) and that he had previously used the service of one of the intervenors herein, Auto Driveaway Company, and had "a lot of trouble" with them. (R.A., pp. 544, 546).

In all three situations at the time of initial claims denial, AAACon had facts consistent with denial or lacked sufficient evidence to show that the claims were valid; therefore denial under these circumstances was not an unreasonable practice.

E. AAACon's claims practices

The Commission's brief repeats the charge that AAACon deliberately sought "to discourage and deny shipper claims." (ICC Br. 13). One supporting example given by the Commission is the use by AAACon of fictitious names by personnel in its claims office. (ICC Br. 15a). The Commission did not find this practice unreasonable, (ICC Br. 15a; R.A., p. 1806), but said the fictitious names "were used in a manner to discourage and confuse ..." (Id.), i.e. that AAACon had a bad purpose or intent here. The only evidence in the record as to AAACon's reason for using fictitious names is the testimony that a claimant:

> "Mr. Kirk, took other measures, not only sending letters to us with offensive remarks on them, but also he took to calling our employees at home at night. It was after the Kirk incident which took place over a period of months with telephone calls, letters, threats and every kind of nasty proceeding that one could manage, we decided that we ought to use a nonexistent person's name to denominate claims department handling." (R.A., p. 1534).

Thus the conclusion on AAACon's intent is based on speculation, not evidence. Furthermore the use of fictitious names as an aid in routing inquiries is not unique to AAACon among ICC regulated carriers. (R.A., p. 1068-1069).

Another illustration, characterized by the Commission brief as "the most glaring example" (ICC Br. 15) was AAACon's use of an arbitration clause in its bill of lading. The Commission did not find

that compulsory arbitration clauses in bills of lading are per se unreasonable, but did find that shippers "might well forego seeking relief" because of an erroneous interpretation of the effect of the clause. (R.A., p. 1806). The Commission did not find, nor was there any evidence, that any shipper did in fact forego seeking relief because of this clause.

AAACon's arbitration clause has been specifically upheld and enforced in many cases (AAACon Br. 12). The clause has "passed muster" in the reasoned view not only of district judges but also in decisions of this Court and of the Third Circuit. Although this Court has recently found the clause to be invalid, Re AAACon Auto Transport Inc. and State Farm Mutual Auto Insurance Co. 537 F. 2d 648 (2 Cir., 6/9/76), until that decision AAACon was using the clause "in a not unreasonable belief as to [its] legality ..." See Interstate Commerce Commission v. AAA Con Drivers Exchange, Inc. et al 340 F. 2d 820, 826 n. 2 (2 Cir., 1965), cert. denied 381 U.S. 911 (1965).

F. Other charges of bad faith.

The remaining indications of AAACon bad faith are listed at TCC Br. 14. The include seven claim files involving denial of claims the grounds of mechanical defects, citing R.A., p. 494 [the Browder claim] and R.A., p. 552 [the Rosen claim]; denial of claims where the shipper had indicated satisfactory delivery of the vehicle by paying the balance of freight charges to the driver, citing "Record, Vol. 2, TR 335 [the Bracken claim], 525 [the Klausner claim] and 559 [R.A., p. 559 -

the Clendenon claim]"; denial of claims because the shipper had retained drivers' fees as settlement, citing "Record, Vol. 3 TR, 1049 [R.A., p. 609 - the Ferreira claim]"; and denials with little or no investigation into the merits, referring to the Wolfe claim. These citations do not supply the Commission with the support implied, viz.:

1. Wolfe. The Commission ignores AAACon's brief, pp. 32-33, which deals with the claim in extenso.

2. Klausner. See p. 13, supra.

3. Bracken. See p. 13, supra.

4. Browder. This automobile's engine "threw a rod," was fixed at the owner's expense (R.A., pp. 490-491), and then the vehicle was completely destroyed in an accident (R.A., p. 493). AAACon ascertained from the driver (R.A., p. 493) and also from the owner of the garage to which the car was taken after it was wrecked that the accident was caused by a faulty steering mechanism. (R.A., p. 1901). AAACon took steps to help Mr. Browder recover the salvage value of his car (R.A., pp. 1900, 1903), but justifiably denied the claim. (R.A., p. 1902).

Until the hearing in this case, AAACon had no advice that Mr. Browder was dissatisfied with AAACon's response to the accident. Mr. Browder never filed what could qualify as a claim under the bill of lading with AAACon (R.A., p. 497).

5. Rosen. The claim was for $28.00 of damage allegedly done to the side mirror of an auto. The driver testified that the mirror was not damaged, he did not "tape" it, and the car was not in an accident.

(R.A., p. 925). Mr. Rosen's wife accepted delivery, paid the driver the balance of the freight charges and signed the bill of lading. (R.A., p. 929). Upon receiving the claim AAACon interviewed the driver, investigated the occurrence and corresponded extensively with the claimant (R.A., p. 1351), who acknowledged that he did not notice the damage for two or three days after delivery. (R.A., p. 555). The claim was denied because it seemed probable that the mirror was damaged during this period especially since the claimant gave AAACon a clear receipt. A carrier is not responsible for damage occurring after completion of transportation. Elder & Johnston Co. v. Commercial Motor Freight, 94 Ohio App. 358, 115 N.E. 2d 179 (1953).

6. Clendenon. The Commission cites this as an example of unreasonable abuse of the vehicle. (ICC Br. 18-19). Mr. Clendenon complained that his car had transmission problems after delivery by AAACon, and that a Dodge mechanic had told him that the gears were stripped due to driver abuse. He added, however, "I don't know if as a matter of fact he knew. All I know is what he told me, this is the probable cause." (R.A., p. 561). Dodge repaired Mr. Clendenon's car under warranty without charge. (R.A., p. 560). A copy of the warranty disclosed that the repairs would not have been performed free under the warranty had the cause actually been driver abuse. (R.A., pp. 1344-1345). Actually Mr. Clendenon never filed a claim. (R.A., p. 563). If he had, AAACon should have denied it.

7. Ferreira. This was a shipment of a car repossessed by the Ferreiras as co-signers of a note when the original owner failed to

keep up payments. (R.A., p. 1402). The car was repossessed for them by a Mr. Young, who tendered it to AAACon for shipment and signed the bill of lading which recorded the condition of the car. (R.A., pp. 1401-1402). The car had extensive damage when AAACon received it (Ibid).

While being transported by AAACon, the car hit a deer and was further damaged. (R.A., p. 600). Mrs. Ferreira testified she was not aware of the condition of the car when it was repossessed and tendered to AAACon (R.A., p. 596); and therefore sought to recover $289.00 (R.A., p. 615) to repair the car. AAACon requested photographs of the damage which she sent (R.A., p. 611). From the photographs, the statement of condition on the bill of lading, and the statements from AAACon's driver, AAACon determined that the accident had caused damage to the headlamp assembly. (R.A., pp. 1408-1409). The headlamp assembly would cost $18.00 to replace, and refinishing the surrounding area would not be more than $30.00. (Ibid). Mrs. Ferreira retained the final $50.00 of freight charges and AAACon considered this an appropriate settlement of the claim. (R.A., pp. 1404-1405). AAACon did not deny liability on this claim as such, but sought to limit its responsibility to the additional damage caused by striking the deer.

In short, these seven claim files support no conclusion that AAACon sought to discourage and deny shipper claims. Some files do not involve actual claims in writing as required by the Uniform Bill of Lading prescribed by the Commission and hence AAACon could not pay them even if meritorious.

G. AAACon's drivers were investigated and qualified.

The Commission cited a number of claims, including some already discussed, to show that AAACon failed to investigate drivers adequately. (ICC Br. 17-19). The accident to Mr. Coggins' car near Palm Beach, Fla. (ICC Br. 18) and the damage to Mr. Klausner's (not "Calusner"-ICC Br. 19) car were the fault of AAACon's agents, not casual drivers. No improvement in driver quality could have done anything to prevent those incidents.

For the claim of Mr. Clendenon, supra, p. 18 , the evidence of driver abuse was hearsay testimony by the claimant of a statement by the mechanic. The claimant even admitted that the mechanic might not have been right. Evidence of driver abuse of the La Frazia car was the hearsay statement that it was driven "at speeds well in excess of 100 miles per hour" (ICC Br. 18). The LaFrazias attempted to introduce the same hearsay in a court proceeding where it was rejected. (R.A., pp. 1675-1680). A description of the car by Mr. La Frazia's cousin (R.A., pp. 1960, 1964) shows it had been modified for racing (R.A., pp. 1482-1483). Even if the hearsay statement was correct there was no evidence of any kind that AAACon's driver was the one who had driven the car at high speeds. AAACon objected to this hearsay. Of course the Commission is free to rely on hearsay. It is not, however, free to ignore the objection, and to leave unexplained its apparent decision that the hearsay here, even though circumstantially impeached (R.A., pp. 1482-1483), was reliable.

Mrs. Raze's fraudulent claim for missing contents of her

trunk has been discussed supra pp. 10 - 12. Her testimony that the car had been operated after the water-hose or radiator malfunctioned, damaging four pistons, and that a new engine had to be installed (ICC Br. 19) was again only hearsay report of statements of a mechanic who stood to benefit if Mrs. Raze ordered expensive repairs (R.A., pp. 707-708). Mrs. Raze's own insurance company denied the claim on the ground of mechanical defect (R.A., p. 730), and thus on a basis inconsistent with driver abuse.

Mr. Harrington's auto was transported between Carteret, N.J. and Yakima, Wash., and the I.C.C. charges that it "was driven on a frolic of about 1,500 miles" (ICC Br. 18). Mr. Harrington's claim was for a ruptured water hose in the amount of $24.38 (R.A., p. 550). Mr. Harrington's statement that the driver put excess mileage on the car was hearsay based upon statements by Mr. Harrington's son. (R.A., p. 551). The driver of this car was an attorney in New York City. (R.A., p. 584). The driver testified that after stopping at his house to pick up his belongings, he drove on the New York State Thruway and I-80 directly to the West Coast. (R.A., pp. 587-589). He denied making a number of the statements supposedly attributed to him by Mr. Harrington's son, including the allegation that he had taken the car to Burbank, California. (R.A., p. 591). The Commission simply ignored this testimony. Even if AAACon had investigated this driver more carefully, all it would have revealed was that he was a law school graduate (R.A., p. 550). If the Character Committee of the Bar found him qualified to practice law, presumably he was also morally qualified to drive a car for AAACon.

The Commission also faults AAACon for allowing "a 21 year old

member of a disbanded rock group" to drive a vehicle 700 miles more than the most direct route between Los Angeles and Washington, D.C. (ICC Br. 18; R.A., p. 1566). The Commission, lamentably, did not specify the exact source of its displeasure. Should AAACon have required the driver to be older or younger? A camp-follower ("groupie") instead of a member? Would it have been preferable if the group had not disbanded? If it had been a jazz or classical group rather than a rock group? If the driver had been a solo performer instead of part of a band?

The owner of this vehicle, Dr. Singpurwalla (misnamed "Dr. Sing" in the initial decision, R.A., p. 1566), filed a claim for $200.00 to compensate for the excess mileage and some additional damage. Dr. Singpurwalla admitted that the $200.00 figure was an arbitrary amount, not any actual damages suffered by him. (R.A., pp. 522-523). Even if AAACon had accepted liability, it could not have paid this claim. The amount of damages is one of the elements of a claim which the shipper must substantiate. Missouri Pacific R. Co. v. Elmore & Stahl, supra 377 U.S. at 138.

Dr. Singpurwalla not only failed to establish the amount of his damages; he also failed to prove that AAACon or its driver had caused any damage. He accepted delivery of the automobile and paid the balance of freight charges (R.A., p. 519). He did not attempt to explain why only one tire was worn down if AAACon's driver had driven excessive mileage (R.A., p. 518). Nor did he keep a record of the mileage at the time of delivery to substantiate his claim of excessive use. (R.A., p. 520). Dr. Singpurwalla testified that the driver admitted

to him going through Colorado (R.A., p. 522); but a reasonably direct route could go through Colorado (R.A., p. 1271). Although the initial decision and the Commission's brief disparaged the driver's lifestyle, he did deliver the vehicle as he was supposed to and acted responsibly in all ways.

The reasons why apparently circuitous routes may be justified were explained by AAACon's witness (R.A., p. 1533):

> "The choosing of a specific route may be left to a certain degree to driver discretion. A route may be very heavily travelled and an alternate route may be a better route. It may be longer in terms of length, but shorter in terms of travelling time. We can't second guess when a driver is in the car what the traffic conditions may be or the weather conditions, or the conditions of the road may be."

The Commission itself has ruled that an irregular route carrier, like AAACon, may not lawfully guarantee to shippers that any movement would necessarily be shipped over the most direct route. Jerry Lipps, Inc. Extension - St. Louis - Florida, 105 M.C.C. 811, 820-821 (No. MC-118959 [Sub 24], Div. 1, 1967), affd. sub nom. Jerry Lipps, Inc. v. Interstate Commerce Commission 299 F. Supp. 942 (E.D. Mo., 1969) AAACon's shippers therefore do not have the right to expect that the most direct route will be used in all instances, nor may AAACon guarantee this or assume liability for excess mileage on any reasonably direct route.

The most lurid example given of failure to investigate

drivers adequately was the use by AAACon as a driver of one William Nelson Beck whom the Commission found had an "extensive record for convictions for auto theft, interstate transportation of stolen motor vehicles, mail fraud, armed robbery, kidnapping and escape from prison on several occasions." (R.A., p. 1594, ICC Br. 17-18). As substantiation for these accusations, the Commission cites "Record Vol. 4, TR 1237" [R.A., p. 798] and "TR 1223" [R.A., p. 784] (ICC Br. 18). The basis for this finding is third-hand hearsay, that an F.B.I. Agent told the witness's lawyer who told the witness about these charges.

AAACon's witness, Mr. R. Zola, testified that he first learned that Mr. Beck was being sought as a fugitive from the testimony offered in this proceeding. (R.A., p. 1505a). Mr. Beck was never on AAACon's payroll as a regular driver or employee. (R.A., pp. 1497-1498). He had driven for a competitor of AAACon before applying to AAACon as a casual driver. (R.A., pp. 1498-1499). When AAACon interviewed him there was no reason to believe he was not qualified. (R.A., pp. 1499, 1505b). After the hearings AAACon obtained and sought to introduce Mr. Beck's driver's record (R.A., p. 1760) which shows no driving offenses or convictions other than those for the accident to the vehicle he was driving for AAACon. AAACon, of course, had no access to F.B.I. files or to records of arrests or convictions. On the other hand, despite the alleged fugitive status of Mr. Beck, the sheriff in charge of the County Jail in North Carolina released Mr. Beck to go to Miami. (R.A., pp. 822-823). If a law enforcement officer, with access to F.B.I. data, did not know that Mr. Beck was a fugitive (if indeed he was) how could AAACon know?

While Mr. Beck's actions while driving for AAACon were reprehensible and criminal, no investigation by AAACon prior to that time could reasonably have discovered his prior offenses. AAACon turned the third party liability claims over to its insurance company. (R.A., p. 1501). These claims, as well as the civil liability of Mr. Beck, were eventually settled by the insurance companies covering liability. (R.A., pp. 1502, 1660, 1671).

Despite these many heinous allegations, and despite the undeniably unfortunate actions of Mr. Beck while driving for AAACon, nothing in the record shows that AAACon's driver investigations were the source of any problem. All of the information which could have reasonably been obtained by AAACon would not have given anyone reason to say that any of the drivers, including Mr. Beck, was unfit to transport cars.

V. The Commission has exceeded its jurisdiction.

A. The I.C.C. has created a new common carrier duty, and assigned it only to AAACon.

The Commission asserts that AAACon's lack of interest and concern for the interests of its customers was inconsistent with its common carrier obligations. (ICC Br. 11). A common carrier owes many duties to its patrons to care for and transport their goods and to refrain from discrimination and preferences. 2 Hutchinson on Carriers, §§493-661 (3rd ed., 1906). It is good business practice if nothing else to avoid the appearance of a lack of interest in the whereabouts of a shipper's property or his claim for loss or damage. But the Commission's requirement in the present case of "...attention and concern to the needs of its customers..." whereby "...every effort be made to furnish the contracted type of service" establishes a new "every effort" standard and applies it only to AAACon. (R.A., p. 1804).

The Commission in 1972 adopted rules governing the processing of claims by carriers, but these rules were not in effect at the time of any of the involved transportation. Nor do they regulate the settlement of claims as the Commission asserts. (R.A., p. 1804). A carrier's refusal to pay claims voluntarily is not a violation of the Interstate Commerce Act. Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186, 207-208 (1911). The Commission itself has said in Larkin v. Erie & W. Transportation Co., 24 I.C.C. 645, 646 (No. 4322, 1912):

> "It is contended by the defendants that this is a loss and damage claim, with which this Commission has nothing to do; and to an extent

this is true.... [A] failure to pay would not be a violation of the act to regulate commerce, but would rather be a violation of the contract of shipment."

The Commission also added in N.Y. Mercantile Exchange v. B. & O. R.R. Co., 36 I.C.C. 156, 160 (No. 6707, 1915):

"It would appear from the record that the carriers evince the greatest reluctance to entertain from egg consignees in New York City claims for loss and damage, except where based on loss and damage disclosed by the examination on arrival of cases showing external evidence of damage, some of the carriers evidently taking the position that they will voluntarily pay no other claims for loss and damage.... The Commission has no power to order the payment of loss and damage claims without litigation if the carriers choose to require consignees to sue on their claims."

Moreover, the Commission ruled in Shou-Gallis Co. v. International Forwarding Co., 268 I.C.C. 591, 593 (No. 29395, Div. 2, 1947) that the Carmack Amendment:

"...recognizes the inherent right of common carriers or forwarders to establish and maintain rules governing the filing of loss and damage claims lodged with them and for instituting suits relative thereto, in that such carrier or forwarder is restricted only in the minimum periods which it may fix."

The Commission's request for authority to adjudicate cargo claims in Loss and Damage Claims, 340 I.C.C. 515, 721-722 (Ex Parte 263, 1972) has not yet been enacted. In that case the Commission acknowledged that it had no jurisdiction to prescribe substantive rules for the settlement of claims. 340 I.C.C. at 541-542. Nevertheless, in the present case the

Commission has declared, without citation to statute or precedent, and solely for application to AAACon, that a carrier's:

> "...record with respect to the satisfactory or unsatisfactory settlement of such claims is among the criteria involved in determining the fitness of a carrier to conduct new or additional regulated operations." (R.A., p. 1804).

Since the Loss and Damage Claims case, the Commission has prescribed rules specifying circumstances when a carrier may not voluntarily pay claims. 49 CFR §1005.2. It has never, except in the case of AAACon, prescribed when a carrier may pay claims prior to a court judgment. The standards promulgated for AAACon and AAACon alone in the Commission's cease and desist order require voluntary payment of claims "when facts available to it are inconsistent with denial" (R.A., p. 1810) even if other facts available are inconsistent with liability. Such an order has to be capricious and arbitrary, as well as ultravires.

B. The I.C.C. seeks to enforce an invalid restriction.

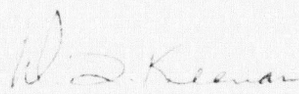
This brief began by showing that AAACon has not violated the restriction in its certificate against transportation of automobiles to dealers. We conclude by asserting that a restriction in a common carrier's certificate against service to a particular class of shippers or consignees is beyond the jurisdiction of the Commission and thereby not enforceable. This point was raised in our initial brief as a question to which the Commission failed to address itself. (AAACon Br. 60). Intervenor, Auto Driveaway Company, replied (Br. p. 23) that since

AAACon had not sought judicial review of the restriction when it was granted, "this court is left with very little to review concerning the interpretation [sic] of the restriction." AAACon was not aggrieved by the contemporaneous interpretation of the restriction. Now, however, the Commission has ordered AAACon to desist from providing services AAACon thought were authorized. AAACon has now exhausted all administrative remedies in the proceedings under review and is not barred from questioning the I.C.C.'s authority to impose the restriction. Chemical Leaman Tank Lines Inc. v. United States, 298 F. Supp. 1269, 1274 at n. 12 (D. Del., 1969).

Section 208 of the Interstate Commerce Act, 49 U.S.C. §308, authorizes the Commission to impose terms and conditions on the issuance of certificates of public convenience and necessity to motor common carriers. This section does not specifically authorize the Commission to restrict transportation to particular classes of persons. Unless this limitation is included under the generic category of "such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require," the Commission is without authority to impose this restriction. In contrast, §209(b), 49 U.S.C. §309(b) permits or requires the Commission to attach to the permits of contract carriers by motor vehicle "conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier...."

The fair implication of this parallel statutory language is that the service of contract carriers is restricted to particular shippers or classes of shippers; while common carriers serve the public generally. Indeed, §203(a) (14-15), 49 U.S.C. §303(a) (14-15) which define common carriers and contract carriers makes this distinction plain. A common carrier "holds itself out to the general public..." id. The Commission has consistently held that common carrier certificates may not restrict service to any limited class of shippers or consignees, even where the carrier has requested such a limitation. Canny Trucking Co., 17 M.C.C. 559, 560 (No. MC-29929, Div. 5, 1939). Globe Cartage Company, Inc., 42 M.C.C. 547, 549 (MC-3339, 1943). C & E Trucking Corp. - Conversion, 82 M.C.C. 147, 148 (MC-2941 [Sub 13], Div. 1, 1959). See also Fox-Smythe Transportation Co. - Extension, 106 M.C.C. 1, 52-53 (MC-114284 [Sub 29], 1967). In restricting AAACon from transporting automobiles to dealers, the Commission has exceeded its authority.

Respectfully submitted,



William Q. Keenan
Attorney for Petitioner
277 Park Avenue
New York, New York 10017

Dated: November 10, 1976

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Brief by first class mail, properly addressed and with postage prepaid, upon all parties of record.

Done in the City, County and State of New York this 10th day of November, 1976.

Martin S. Snitow